WONG THEAN CHYE & ANOR

v.

JUNIMAS SDN BHD & OTHER CASES

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[SUIT NOS: 22-243-1997, 22-419-1997 & 22-203-1998]
25 FEBRUARY 2003

CONTRACT: *Assignment - Sale and purchase of dwelling units - Assignment by purchasers in favour of bank in return for housing loan - Whether assignment absolute - Whether conditional - Whether only an "equitable chose in action" - Delay in completion - Whether purchasers had locus to sue - Civil Law Act 1956, s. 4(3) - Rules of the High Court 1980, O. 33 r. 2*

The plaintiffs had sought to purchase certain dwelling units from the housing developer defendant and had executed: (i) a sale and purchase agreement with the defendant; and (ii) a loan agreement-cum-assignment with the bank to secure the loan to finance the purchase ('the assignment'). Subsequently, the plaintiffs sued the defendant for breach when the latter failed to complete the units within the stipulated time. Before the learned judge, the defendant raised a preliminary issue that the plaintiffs had no *locus standi* to bring the proceedings, as the assignment was an absolute assignment wherefore the plaintiffs had transferred all their rights and interests in the said dwelling units to the bank. It was not in dispute that the word "absolutely" was used in the assignment, and that being so, questions arose as to: (i) whether the assignment was an absolute assignment; and (ii) whether the plaintiffs had the locus to institute the suit herein.

Held:

[1] The intention of the parties as expressed in the assignment was for the assignment to be conditional by way of a security and not for it to be an absolute assignment to the bank whereby the plaintiffs transferred all their rights and interests in the said dwelling units to the bank. The use of the words "upon security of an assignment", "money hereby secured", "the security", "any money intended to be hereby secured", "this security" and "the security hereby created" in the assignment and the recitals thereto bears testimony to this intention. (pp 292 h-i; 293 a-b)

[2] There is also an extremely significant clause in the assignment which expressly provides that upon the issue of the individual strata titles to the said dwelling units the plaintiffs would, at their own cost and expenses, take a transfer of the individual strata titles and execute a statutory charge in the form prescribed in the National Land Code in favour of the bank to secure the repayment to the bank of the balance loan due. This apart, clause 5.01 of the assignment in Civil Suit No. 22-5419-97 additionally provides that in the event that individual titles were issued in respect of the said dwelling units, the bank would have custody of the individual strata titles for the duration of the assignment, meaning that, the individual titles, once issued would be retained by the bank as further security for the loan. These clauses, taken with the words and expressions as used in the assignment aforesaid, showed that the parties had intended that each of the assignment was nothing more than an "equitable chose in action" which would expire and revert back to the assignor plaintiffs, when the latter had fully repaid their housing loans, which event is uncertain in nature, whereupon they would be entitled to a discharge and release of the said dwelling units from the bank. In the circumstances, the court would reject the defendant's contention that the word 'absolutely' as used in the assignment was indicative of an intention to render the assignment an absolute assignment, as opposed to an assignment executed by way of security only. (pp 293 c-d & 294 e-i)

[3] The bank is only interested in the due repayment of the housing loans by the borrowers, and not concerned with the delay in the completion of the dwelling units. By contrast the plaintiffs would be gravely prejudiced by delays in the completion of the said dwelling units and common facilities and any breaches of the agreement by the defendant. The bank having given its consent, the plaintiff were therefore legally competent to institute proceedings against the defendant in their own names. (p 295 b-d)

[Plaintiffs having locus to sue.]

Case(s) referred to:

Bank of Commerce (M) Bhd v. Mahajaya Property Sdn Bhd [1975] 5 MLJ 620 ***(foll)***
Durham Brothers v. Robertson [1898] 1 QB 765 ***(foll)***
Max-Benefit Sdn Bhd v. Phuah Thean An & Anor [2001] 2 CLJ 70 HC ***(foll)***
Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(foll)***
Pak Ki Yau & Anor v. Kumpulan Promista Sdn Bhd [1999] 4 CLJ 205 HC ***(foll)***
Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 3 CLJ 275 HC ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 33 r. 2

For the plaintiffs - Zaireen Zainal; M/s Thevin Chandran & Assoc
For the defendants - Lakhbir Singh Chahl; M/s Lakhbir Singh, Yagoo & Assoc

Reported by WA Sharif

JUDGMENT

Su Geok Yiam JC:

There are three cases altogether, namely, GS No: 22-243-97, GS No: 22-419-97 and GS No: 22-203-98 which involve the same defendant but different plaintiffs.

Facts And Background

In all the three cases, the defendant is the developer and the plaintiffs are the purchasers of dwelling units in a block of apartments with common facilities on lands developed by the defendant which development is known as the "Kayangan Puri Mutiara", located in Medan Fettes, 11200 Pulau Pinang.

In Civil Suit GS No: 22-243-97, the plaintiffs are the beneficial owners of apartment No: 90-05-06 which corresponds to parcel No. 4, Storey 3, Block Cahaya, Kayangan Puri Mutiara.

In Civil Suit GS No: 22-419-97, the plaintiffs are the beneficial owners of apartment 88-2-7 which corresponds to parcel No. 15, Storey 2, Block Awan, Kayangan Puri Mutiara.

In Civil Suit GS No: 203-98, the plaintiffs are the beneficial owners of apartment 84-4-02 which correspond to parcel No. 10, Storey 4, Block Awan, Kayangan Puri Mutiara.

Loan Agreements Cum Assignments

The plaintiffs, subsequently, executed with the defendant's consent loan agreements-cum-assignments in which the word "absolutely" is used, in favour of the Standard Chartered Bank Malaysia Berhad in respect of Civil Suits GS No. 22-243-97 and GS No. 22-419-97 and Ban Hin Lee Bank Berhad in respect of Civil Suit GS No. 22-203-98 (hereinafter referred to as "the bank") in return for housing loans to finance their purchase of the said dwelling units from the defendant. A copy of the respective loan agreement cum assignment is exhibited in the defendant's respective supporting affidavit as exh. "TEH3" in respect of Civil Suit GS No. 22-419-97 and exh. "TEH2" in respect of Civil Suit GS No. 22-243-97 and GS No. 22-203-98.

Sale And Purchase Agreements

By the respective sale and purchase agreements exhibited in the defendant's respective supporting affidavit as exh. "TEH1" entered into between the plaintiffs and the defendant in 1990 in respect of the said dwelling units the defendant had covenanted to deliver vacant possession to the plaintiffs and also complete the common facilities within specified dates failing which the defendant would be liable to pay to the plaintiffs liquidated damages calculated at 10% of the purchase price of the said dwelling units for the duration of the delay.

Plaintiffs' Writ Of Summons And Statements Of Claim

In their writ of summons and statements of claim, the plaintiffs are seeking for, *inter alia*, various declarations and liquidated damages in respect of numerous alleged breaches of the sale and purchase agreements by the defendant, *inter alia*, in not completing the dwelling units and common facilities within the time frame specified in the sale and purchase agreements and in failing to construct certain common facilities such as a jogging track, a surau, swimming pools, etc.

Defendant's Statements Of Defence And Counter-claims

In their statements of defence and counter-claim the defendant contend, *inter alia*, that the plaintiffs have no right or *locus standi* to bring the proceedings against the defendant and that the defendant did not commit any breaches of the sale and purchase agreements. The defendant also counter-claimed for various sums from the plaintiffs being arrears of service charges in respect of the common facilities.

Preliminary Issue - Whether Plaintiffs Have Locus standi To Sue In Their Own names

In all the three cases, the defendant filed a similar application pursuant to O. 33 r. 2 of the Rules of the High Court 1980 seeking, *inter alia*, the court's determination of the following identical preliminary issue partly of fact and partly of law:

Whether the plaintiff has the *locus standi* to bring the proceedings against the defendant in his own name.

In the event the court rules in favour of the defendant, the defendant prays that the court strikes out the plaintiff's claim.

In Civil Suit GS No: 22-243-97, the application is at encl. (14) and it is supported by the affidavit of the defendant affirmed by Teoh Ean Hooi, the defendant's managing director, on 23 May 2002 (encl. (13)). In Civil Suit GS No: 22-419-97, the application is at encl. (11) and it is supported by the affidavit of the defendant also affirmed by Teoh Ean Hooi, the defendant's

managing director, on 23 May 2002 (encl. 10)). In Civil Suit GS No: 22-203-98, the application is at encl. (10) and it is supported by the affidavit of the defendant affirmed by Teoh Ean Hooi, the defendant's managing director, on 23 May 2002 (encl. (9)).

On 31 October 2002, Dato' Lakhbir Singh, learned counsel for the defendant in all the three cases, informed the court that both parties have agreed to proceed with Civil Suits GS No. 22-243-97 and GS No. 22-419-97 first and to await the decision of the court in the two cases before proceeding with the third case, Civil Suit GS No. 22-203-98.

Decision Of The Court

On 11 December 2002, after having considered the respective affidavits filed by the plaintiffs and defendant in both the cases, the oral and written submissions of both Dato' Lakhbir Singh Chahl, the learned counsel for the defendant, and Puan Zaireen bt Zainal, the learned counsel for the plaintiffs, and the various authorities cited by them the court ruled in favour of the plaintiffs and dismissed the defendant's application with costs in the cause.

Both parties then prayed that the court rule on the defendant's application (encl. (10)) in the third case, GS No. 22-203-98. The court, accordingly, ruled that the question posed should be in the affirmative.

The defendant being dissatisfied with the order of the court initially filed a notice of appeal to the Court of Appeal in respect of all three cases. Subsequently, the defendant has withdrawn its notice of appeal in respect of Civil Suit GS No. 22-419-97.

Whether Assignment Absolute Or Conditional

The reasons why the court decided the preliminary legal issue in favour of the plaintiffs are as follows:

Upon applying the statement of principle in the Federal Court case of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231, that whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s. 4(3) of the Civil Law Act 1956 is to be gathered from the four corners of the instrument itself, and upon a proper construction and interpretation of the wording used in the loan agreement cum deed of assignment in order to determine the intention of the parties the court was satisfied that the intention of the parties as expressed therein was for the assignment to be conditional only being by way of a security and not for the assignment to be an absolute assignment to the bank whereby the plaintiffs transferred all their rights and interests in the said dwelling units to the bank.

This is borne out by the use of various words in the assignment, for eg, the words "upon security of an assignment" used in the recital, the reference to "separate document(s) of title" in respect of the said dwelling units which have yet to be issued in the recital, the words "money hereby secured" in cls. 11(b), (c) and (d), the words "the security" in cl. 15, the words "the money hereby secured" in cl. 23, the words "any money intended to be hereby or otherwise secured" in cl. 23, the words "this security" in cl. 27 and the words "the security hereby created" in cl. 44.

In my judgment, apart from the above, there is also an extremely important and significant clause in the assignment which expressly provides that upon the issue of the individual strata titles to the said dwelling units the plaintiffs shall, at their own cost and expense and upon being required by the bank, take a transfer of the individual strata titles and execute a statutory charge in the form prescribed in the National Land Code 1965 in favour of the bank to secure the repayment to the bank of the balance of the loan due and all other moneys together with interest thereon payable by the plaintiffs to the bank.

In respect of Civil Suits GS No. 22-243-97, GS No. 22-419-97 and GS No. 22-203-98, the clauses concerned are cls. 18(b), 4.05 and 11, respectively.

The three clauses are reproduced as follows:

18. COVENANT TO CHARGE

(a) ...

(b) Upon issue of a separate document of title to the said property or the strata title to the said property by the relevant authority the borrower shall at its own cost and expense and upon being so required to do by notice in writing from the Bank take a transfer of and execute a charge over the strata title to the said property, such charge to be in such form acceptable to the Bank in favour of the Bank to secure the repayment to the Bank of the balance of the loan then due and all other monies together with interest thereon at the prescribed rate payable and owing by the borrower to the Bank under and by virtue of this agreement at the date of the execution of such charge.

Section 4.05

EXECUTION OF CHARGE

Upon the issue of separate document(s) of title to the said property by the relevant governmental authorities, the Assignor shall at its own cost and expense and immediately upon being so required to do so by notice in writing from the Bank take a transfer of the Said Property and immediately deliver

a and deposit or cause to deliver and deposit with the Bank or its solicitors the relevant documents(s) of title and Memorandum of Memoranda of Transfer and all other documents together with all necessary stamp and registration fees for effecting the registration thereof free from encumbrances and shall at the Assignor's own cost and expenses immediately execute a statutory charge in the form prescribed under the National Land Code over the separate b document(s) of title to the said property such charge to be in form and substance prescribed by the Bank at its sole and absolute discretion in favour of the Bank to secure the repayment to the Bank of the balance of all principal sums then due and all other moneys together with interest thereon payable and owing by the Assignor and or any Security Party to the Bank.

c **11. REGISTRATION OF CHARGE**

When the Assignor(s) is/are entitled under the Sale and Purchase agreement to present for registration at the appropriate Land Registry the Memorandum of Transfer in respect of the said property in his/her/their/its favour and upon being required so to do by notice in writing from the Bank the Assignor(s) d shall forthwith at is own costs and expense take all necessary steps to have the said Memorandum of Transfer registered in his/her/their/its favour and execute a Memorandum of Charge in such form and content as the Bank may in its absolute discretion decide and have the same registered in favour of the Bank (hereinafter called "the Charge").

e Clause 5.01 of the assignment in Civil Suit GS No. 22-419-97 also provides additionally that in the event that individual titles are issued in respect of the said dwelling units the bank shall have custody of the individual strata titles for the duration of the assignment. By this clause, the individual titles once issued will be retained by the bank as further security for the loan.

f By these clauses taken together with the words and expressions already referred to above in this judgment and the respective clauses in which they are found the court is convinced that the parties intended that each of the assignment is nothing more than an "equitable chose in action" which will expire and revert back to the plaintiffs being the assignors when the plaintiffs have fully repaid g their housing loans, which event is uncertain in nature, whereupon the plaintiffs will be entitled to a discharge and release of the said dwelling units from the bank or upon the due execution of a valid charge over the dwelling units in favour of the bank when the individual strata titles are available, which event is, again, uncertain in nature.

h The court rejected the defendant's contention that the word "absolutely" used in cl. 4.01 of the assignment in Civil Suit GS No. 22-419-97 and in cl. 6 of the assignment in Civil Suits GS No. 22-243-97 and GS No. 22-203-98 show that it is the intention of the parties to render the assignment an absolute

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assignment as opposed to an assignment executed by way of security only, being a device created solely in order to achieve as similar a purpose as a charge on the title in respect of a landed property or a charge on the strata title or title in mid-air, in respect of property such as a flat or apartment.

In all the assignments the bank is only interested in the due repayment of the housing loans by the borrowers, to wit, the plaintiffs. The bank is certainly not concerned with the delay in the completion of the dwelling units nor the common facilities nor the alleged numerous breaches by the defendant.

This is so because whatever may happen to the property the plaintiffs are still bound by their covenants to repay the bank as set out in the assignment. By contrast the plaintiffs will be gravely prejudiced by delays in the completion of the said dwelling units and common facilities and any breaches of the sale and purchase agreements by the defendant. In my judgment, the plaintiffs are legally competent to institute proceedings against the defendant in their own names as the bank has given its consent.

With respect I adopt the following view as expressed by Abdul Aziz Mohamad J (now JCA) in the case of *Sakinas Sdn. Bhd. v. Siew Yik Hau & Anor* [2002] 3 CLJ 275, at p. 281:

> The actual phraseology does not matter. I would take that to mean that if the assignment were to use the word "absolutely" it would not fall within s. 4(3) if the **intention was to give a charge only.** (emphasis added)

the following view of KC Vohrah J (as His Lordship then was) in *Max-Benefit Sdn. Bhd. v. Phuah Thean An & Anor* [2001] 2 CLJ 70, at p. 73:

> Although the assignment is stated to be absolute in effect it is not. The assignment was purely for the **purpose of securing the loan.** What I have adverted to show is that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interest over the property were assigned as surety **to ensure that the loan will be repaid.** The loan or any balance or part of it was given "upon the security of the same property." (emphasis added)

the following view of Clement Skinner JC (as His Lordship then was) in *Pak Ki Yau & Anor v. Kumpulan Promista Sdn. Bhd.* [1999] 4 CLJ 205, at p. 212:

> ... despite the fact that the word 'absolutely' is used in the assignment clause (cl. 4), there are **other clauses** which **show that the full and entire benefit of the sale agreement and all rights, title and interests of the appellants therein have not been transferred to the respondent.** (emphasis added)

and the following view of Augustine Paul J in the case of B*ank of Commerce (M) Bhd. v. Mahajaya Property Sdn. Bhd.* [1975] 5 MLJ 620, at p. 636 following the decision in the English case of *Durham Brothers v. Robertson* [1898] 1 QB 765:

> ... the assignment is to continue only till the full repayment of the loan and interest. On repayment of the loan and interest, the assignment comes to an end. The repayment of the loan advanced is an uncertain event and makes the **assignment conditional**. This would involve the defendant in the state of the accounts between the plaintiff and the assignor. Accordingly, it is my view that the **assignment is not absolute**. (emphasis added)

In the premises, the court answered the preliminary issue in the affirmative and, consequently, dismissed all the three applications of the defendant with costs in the cause as the court was satisfied that all the three assignments were conditional assignments.